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No. 89-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LEONARDO BENITEZ AND JOHN LEADBEATER,

Petitioners,

– against –

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Does the suability statute applicable to Respondent Port Authority Trans-Hudson Corporation, specifically the reference to federal judicial districts in the general purpose venue provision, constitute a waiver of Eleventh Amendment immunity in light of this Court's stringent standards for a finding of waiver.

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REASONS FOR DENYING THE WRIT

The Court Below Correctly Decided The Issue In Accordance With Controlling Precedent Of This Court

Respondent, Port Authority Trans-Hudson Corporation (PATH) agrees with Petitioners that there is a direct conflict between the decision of the Third Circuit in the instant matter, namely, *Leadbeater v. Port Authority Trans-Hudson Corporation* (App. D, A18-28), reported at 873 F.2d 45, *reh. den.*, ____ F.2d ____ (3d Cir. 1989), and the decision of the Second Circuit in *Feeney v. Port Authority Trans-Hudson Corporation* (App. C, A4-17), reported at 873 F.2d 628, *reh. den.*, ____ F.2d ____ (2d Cir. 1989).

In *Feeney* the Second Circuit held first that PATH does not enjoy Eleventh Amendment immunity, and second that even if it did, immunity had been waived (A6) Indeed, Respondent, itself, has petitioned this Court for a Writ of Certiorari in the *Feeney* case and thus Respondent obviously acknowledges that the issue raised by the instant petition warrants review by this Court.

However, irrespective of the attempt by these Petitioners to state more broadly the question presented for purposes of the instant petition, this case properly raises only the question of waiver, not the underlying question of PATH's status as a state agency for Eleventh Amendment purposes; whereas in *Feeney* both questions are directly placed in issue.

More specifically, the instant Petitioners at no time contested below the fact that PATH was constitutionally entitled to Eleventh Amendment immunity. In this regard the Third Circuit noted:

> "This appeal presents the discrete question whether plaintiffs' suits in federal court against P.A.T.H. are barred by the eleventh amendment. In [the earlier case of] *Port Authority Police Benevolent Association v. Port Authority*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S.Ct. 344 (1987), we concluded that the Port Authority is an arm of the compacting states entitled to eleventh amendment immunity . . . P.A.T.H. contends that as a matter of federal law it has eleventh amendment immunity to the same extent as the Port Authority. Plaintiffs do not contend otherwise, and therefore we proceed on that premise." (citations omitted) (A20)

Proceeding on that premise, the Third Circuit held against the instant Petitioners, ruling that the bi-state suability statute did not waive PATH's Eleventh Amendment immunity. (A 24-25)

Thus, the Second Circuit's decision in *Feeney* indeed is in direct conflict with the Third Circuit's decision in the instant matter. However, it is the Third Circuit's decision which has correctly decided the issue by properly applying the past precedents of this Court. The Second Circuit decision in *Feeney*, on the other hand, simply fails to apply these precedents and thus warrants review by this Court. The Court is respectfully referred to the Petition for a Writ of Certiorari filed in *Feeney v. Port Authority Trans-Hudson Corporation*, Docket No. 89-386.

CONCLUSION

Inasmuch as this Court's decision in *Feeney* will resolve the issue presented by the instant petition, this Court should grant the petition in *Feeney* and retain jurisdiction over the instant petition for resolution in accordance with this Court's decision in *Feeney*.

Dated: New York, New York
October, 1989

Respectfully submitted,

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